

Essay

On Property: An Essay

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There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property.

Blackstone¹

In our time property is the root of all evil and of the suffering of men who possess it, or are without it, and of all the remorse of conscience of those who misuse it, and of the danger of collision between those who have [it] and those who have it not.

Property is the root of all evil: and, at the same time, property is that toward [which] all the activity of our modern world is directed, and that which directs the activity of the world.

Tolstoy²

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1. 2 W. BLACKSTONE, COMMENTARIES *2.

2. L. TOLSTOY, *quoted in* A. CARTER, THE PHILOSOPHICAL FOUNDATIONS OF PROPERTY RIGHTS 1 (1989).

I. INTRODUCTION

The concept of property is powerful. It has a peculiar hold on the human imagination and a particularly fundamental place in our constitutional structure.³ For the Founding generation⁴ and later constitutional interpreters, property has been more than simply an imaginative or symbolic concept: it has been the medium through which struggles between individual and collective goals have been refracted. Protection of individual property rights has cut across all parts of the political spectrum and has advanced radically different visions of the values to be protected in American society.⁵

What is property? The importance of this concept is matched by the difficulty of its definition. Felix Cohen has written that any useful definition of property "must reflect the fact that property merges by imperceptible degrees into government, contract, force, and value."⁶ Another commentator has written that "what is property may depend upon the action that is dependent upon the answer."⁷

In this Essay, I examine the concept of property as it is reflected in the Supreme Court's recent Fifth Amendment due process and takings clause jurisprudence, and in other current approaches. I argue that the Supreme Court's reliance on an "objective" or "technical" definition of property leads to conflicting and contradictory results. I further argue that contemporary attempts by scholars to reconstruct the historical understanding of property also fail to overcome this incoherence. Both efforts—which reflect what I shall call an "absolute approach"—fail because they are based upon the same unarticulated assumptions: that property is objectively definable or identifiable, apart from social context; and that it represents and protects the sphere of legitimate, absolute individual autonomy.

The contemporary impulse toward equating the sphere of absolute individual autonomy with the concept of property is, in fact, a radical narrowing of the historical understanding of property. During the American Founding Era,

3. See, e.g., U.S. CONST. art. 1, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."); *id.*, amend. V ("No person shall be . . . deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation."); *id.*, amend. XIV, § 1 ("nor shall any State deprive any person of . . . property, without due process of law").

4. The preoccupation of the American Founders with the protection of property has long been the subject of scholarly commentary and debate. See McDonald, *A New Introduction*, in C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1986).

5. Protection of individual property rights has included the hegemony of "freedom of contract" in the late nineteenth and early twentieth centuries, the subsequent erosion and eventual abandonment of "economic due process" in the late 1930's, and later civil libertarian protection of individual rights. See Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703, 716-17 (1975); see, e.g., Funston, *The Double Standard of Constitutional Protection in the Era of the Welfare State*, 90 POL. SCI. Q. 261 (1975); McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34.

6. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

7. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691, 694 (1938).

property included not only external objects and people's relationships to them, but also all of those human rights, liberties, powers, and immunities that are important for human well-being, including: freedom of expression, freedom of conscience, freedom from bodily harm, and free and equal opportunities to use personal faculties. From an analysis of the particular rights, liberties, powers and immunities contained within this broader conception, I argue that property, in the historical view, did not represent the autonomous sphere of the individual to be asserted against the collective; rather, it embodied and reflected the inherent tension between the individual and the collective. This tension—now seen as something external to the concept of property—was in fact internal to it.

Reclaiming this conception⁸—which I shall call the “comprehensive approach”—provides an analytic framework that lends important insights into the historical and jurisprudential treatment of the concept of property. It exposes the core incoherence in the Supreme Court's current approach to property: specifically, the conflict between the Court's ostensible use of an absolute conception of property and its actual use of a broader conception—one that remains largely unrevealed. Adoption of the comprehensive approach would force courts to face explicitly the real policy issues involved in cases decided under the takings and due process clauses, rather than resolving them silently and obliquely through artificial manipulation of technical definitions of property. This framework also makes explicit the role that an assumed, absolute conception of property has had in the choice of the type of protection given to interests threatened under the takings clause, and in the calculation of compensation when the latter is imposed.

Finally, I suggest that there is intrinsic value in our rethinking of the concept itself. The concept of property has powerful, rhetorical force. It is not incidental to our lives or to our legal system; it is of central, almost emotional importance. Contemporary approaches proceed from a vision of property as that which protects and separates the individual from the collective sphere. By viewing the collective context as necessary for the definition and exercise of individual rights, the comprehensive approach forces us to rethink our image of the relationships between individuals and the collectives of which they are parts. It can lead us to a different concept of individual well-being and autonomy: one that recognizes the individual's need for freedom as well as the need for the development and expression of that freedom in the context of relatedness to others.

8. The degree of self-consciousness about the use of this approach varied widely, with Madison, Locke, and the English Opposition writers exhibiting greater awareness in this regard than other writers of their day. See *infra* Section III. In this essay, I shall attempt to draw out the implications and the logic of a conception that was widely held during that era, not to claim that those who were writing at that time used such terms.

II. CURRENT APPROACHES

In modern constitutional jurisprudence, the definition of property has played its most critical role in the context of the due process and takings clauses of the Fifth Amendment. Both clauses have been loci for friction between the individual and government. Both clauses involve, at least ostensibly, the same concept: property. Under both clauses, the existence of a cognizable property interest is the threshold and often determinative question. Various tests—such as the “ordinary understanding” approach,⁹ the “reasonable expectations” approach,¹⁰ the “functional” approach,¹¹ the “bundle of rights” approach,¹² and others¹³—have been used to determine whether a constitutionally cognizable property interest exists.¹⁴ The resulting incoherence is profound. An easement, conceptually severed from the underlying land, is property and compensable if taken;¹⁵ twenty-seven million tons of coal are not.¹⁶ The right to occupy land,¹⁷ or to pass land to one’s heirs,¹⁸ is property, compensable if taken;

9. This approach begins from the premise that the layperson understands property to be physical objects, or “things,” and proceeds to question whether a particular interest is sufficiently “thing-like” to be property. An example of this approach is Bruce Ackerman’s reference to the “Ordinary Observer.” B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 97-103 (1977); *see also* *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831 (1987) (upholding right to enjoyment of one’s land unencumbered by public access); *Hodel v. Irving*, 481 U.S. 704, 716 (1987) (upholding right to bequeath property to one’s heirs).

10. Under this approach, interests that are claimed to be property must be sufficiently bound up with a claimant’s “reasonable expectations” to achieve recognition. *See, e.g.,* *Agins v. Tiburon*, 447 U.S. 255, 262 (1980); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (investment interests protected only to extent of reasonable return). The “entitlement” doctrine in due process cases is a variant of this approach. *See, e.g.,* *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (existence of federally protected property interest depends on whether it was created by “existing rules or understandings that stem from an independent source such as state law”).

11. Under this approach, public sector jobs, licenses, and public income benefits are examples of “property” under the due process clause. *See Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

12. Under this approach, a claimed interest is property if it is included within the traditional “bundle” of rights associated with property. This may be based on a “thing-like” conception of property, *see supra* note 9, or on something else, such as a functional definition, *see supra* note 11.

13. *See, e.g.,* Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (extent to which interests are integral to personhood should affect protection they are afforded as property); Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988) (relational interests, i.e., reliance interests created over time, should be considered in recognition of property rights).

14. Sometimes the issue is framed as whether the harm caused by governmental action is sufficient to constitute a “taking” of property. *See, e.g.,* *PruneYard Shopping Center v. Robbins*, 447 U.S. 74, 82-83 (1980); *Penn Central*, 438 U.S. at 122. However, it is difficult to see how there is not a “taking” in all cases where an individual’s rights against the collective (i.e., her “property”) are non-reciprocally impaired. *See id.* at 143-50 (Rehnquist, J., dissenting) (destruction of recognized property interests is taking, unless nuisance exists or claimant receives reciprocal benefit from challenged governmental activity); Rose, *Comment: Property as Wealth, Property as Propriety*, in *COMPENSATORY JUSTICE: NOMOS XXXIII* 1-3 (J. Chapman & J. Coleman eds. 1990) (unpublished manuscript) (whether governmental action is a “taking” “depends upon some underlying understanding of what a property right entitles you to do, and what it does not”).

15. *Nollan v. California Coastal Comm’n*, 483 U.S. 825, 831-32 (1989).

16. *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 498-99 (1987).

17. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

18. *Hodel v. Irving*, 481 U.S. 704 (1987).

the right to modify a building that one owns,¹⁹ or to prevent physical invasion,²⁰ is not. Attempted symmetry between the treatment of property under the takings clause and under the due process clause also leads to incoherence in social vision, since many who support governmental efforts to redistribute property advocate a narrow definition of protected property in the takings context and a broad definition in the due process context,²¹ while many who hold the opposite view favor the reverse.²² Indeed, the situation has caused one commentator to charge that the concept of property "is no longer a coherent or crucial category in our conceptual scheme" and that "[t]he concept of property and the institution of property have disintegrated."²³

The incoherence in current approaches has led some to advocate a return to what is claimed to be the original understanding of property. Richard Epstein, in *Takings: Private Property and the Power of Eminent Domain*,²⁴ sets forth a conception of property that he attributes to Locke and the American Founders. Under this view, property is a simple concept: it is the individual's right to unfettered possession, disposition, and use of corporeal and incorporeal objects. Any governmental action that limits these rights, as historically defined, is a *prima facie* "taking" under the Fifth Amendment. If the taking is a justified exercise of the police power, no compensation is due; if it is not, it can only be done for another legitimate public use, and only with the payment of compensation.²⁵ Under this analysis, all governmental attempts to redistribute income through modification of common law liability rules, taxes, and other regulations are takings. To the extent that such governmental transfers do not

19. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 128-38 (1978).

20. *See PruneYard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

21. Compare Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097 (1981) (advocating constitutional foundation for protected property rights) with Michelman, *Takings*, 1987, 88 COLUM. L. REV. 1600 (1988) (arguing against "classical liberal" conception of property which constitutionally immunizes property rights against change); Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676-78 (1988) (voicing concern about Supreme Court's willingness to sever conceptually and provide constitutional protection for property rights in takings cases) [hereinafter *Liberal Conception of Property*] with Radin, *supra* note 13 (advocating broad protection for property identified with personhood). Both Michelman and Radin attempt to reconcile these conflicting impulses by arguing that the degree of constitutional protection afforded should reflect inequalities in political and economic power. *See* Michelman, *Property as a Constitutional Right*, *supra*, at 1112-14; Radin, *Liberal Conception of Property*, *supra*, at 1692-95.

22. *See, e.g., R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (broad definition of property in takings clause does not apply to welfare benefits or other property obtained as result of collective attempts to redistribute income).

23. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69, 74 (J. Pennock & J. Chapman eds. 1980).

24. R. EPSTEIN, *supra* note 22.

25. *Id.* at 10-25, 35-104, 112, 161-98. This may include "implicit in-kind" compensation, where restrictions imposed by the general legislation upon the rights of others serve as compensation for the property taken. *Id.* at 195.

equally benefit the parties from whom they are taken and to whom they are given, they are unconstitutional.²⁶

Other commentators, although highly critical of Epstein's use of this "original understanding" of property for the purposes of constitutional interpretation, do not challenge the starting point of his analysis: that property, as historically understood, meant the individual's right to unfettered possession, disposition, and use of material (and nonmaterial) things. Frank Michelman has written that the Founders of American constitutionalism believed that:

property was [the] inspiration for the idea of a private sphere of individual self-determination securely bounded off from politics by law. . . . Property could bear such a heavy and crucial ideological load because it was itself such a natural part of normative political imagination—transparent, unproblematic, and visually arresting in the mind's eye. In the [F]ounders' world, marking the boundaries between *meum* and *teum* [sic] felt . . . both conceptually and morally easy.²⁷

Jennifer Nedelsky has written that in the Founding Era, property had a powerful, rhetorical image; it was "a specific, identifiable, knowable entity which held a special place in law, republican theory and 'society'. Property was 'something' which was important, which required and was entitled to protection, which could be threatened and whose destruction or violation would cause far-reaching damage."²⁸ She writes:

The Federalists drew on a tradition (Locke, for example) which emphasized rights as the object of legitimate government and hence the limit to it. But in the context of the American fear of *popular* tyranny, the conception of rights as limiting values hardened into opposed categories of state vs. individual and public vs. private. Individual autonomy was conceived of as protected by a bounded sphere—defined primarily by property—into which the state could not enter. The sphere of rights, freedom, autonomy was private.²⁹

Nedelsky acknowledges that "[i]t is certainly not the case that the traditional conceptions of property—either constitutional or Common Law—have been

26. *Id.* at 93-104. Epstein acknowledges that his position would invalidate much of the legislation of the 20th century. *Id.* at 281.

27. Michelman, *Takings*, 1987, *supra* note 21, at 1626-27 (footnotes omitted). Michelman notes that the actual operation of property law in the Founding Era may have been considerably more qualified and socially contingent. *Id.* at 1627 n.138.

28. Nedelsky, *American Constitutionalism and the Paradox of Private Property*, in CONSTITUTIONALISM AND DEMOCRACY 241, 252 n.19 (J. Elster & R. Slagstad eds. 1988).

29. Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J. OF L. & FEMINISM 7, 17 (1989) (emphasis in original) (footnote omitted).

simple or exclusively material. But they have had a clear material base which is the core of both the legal and popular conceptions.”³⁰

The Supreme Court’s formulations, and the historical portrayals above, all rest on the assumptions that property is something that is objectively definable or identifiable, apart from social context, and that it represents and protects the sphere of legitimate, absolute individual autonomy.³¹ The thrust of such conceptions of property is the identification of what the individual’s autonomous sphere should be, based upon the recognition and protection of individual interests alone. If individual interests fall within the layperson’s “ordinary understanding,” are “reasonable,” serve a valid economic function, or concern the possession, use or disposition of corporeal or incorporeal objects, then they are property; the consideration of collective interests is a distinctly separate and second-order matter. When this absolute approach to property is combined with seemingly absolute constitutional guarantees,³² a difficult problem is presented. Property rights, like all individual rights, are rarely absolute in any society.³³ If property is that which objectively describes the individual’s autonomous sphere, how can the protection of property under the takings and due process clauses be reconciled with conflicting social goals? Must we choose between the artificial manipulation of a purportedly absolute conception (with resulting intellectual incoherence) and the endorsement of radical individualism if we are to retain any fidelity to historical or intuitive understandings?

III. THE COMPREHENSIVE APPROACH TO PROPERTY

During the debate in the Federal Convention of 1787, Hamilton stated that the “[o]ne great object of Gov[ernment] is personal protection and the security

30. Nedelsky, *supra* note 28, at 270 (footnote omitted). Cf. Grey, *supra* note 23, at 73 (conception of property held by legal and political theorists at end of 18th century, the high point of classical liberal theory, “coincided precisely with the present popular idea, the notion of thing-ownership.”).

31. This image of property is captured by Charles Reich:

Property draws a circle around the activities of each private individual . . . Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference.

Reich, *supra* note 11, at 771.

32. See *supra* note 3. Under the takings clause, the absolute nature of the constitutional command could be tempered by a finding of the absence of public use or the payment of implied compensation. Under current Supreme Court doctrine, however, both are intellectually slender reeds. See, e.g., *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) (“The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received.”); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (“public use” requirement is coterminous with scope of putative public purpose).

33. See, e.g., *Keystone Bituminous Coal Ass’n*, 480 U.S. at 491-92 (property is held under implied obligation that owner’s use of it not be injurious to community); 1 R. VON JHERING, *GEIST DES RÖMISCHEN RECHTS AUF DEN VERSCHIEDENEN STUFEN SEINER ENTWICKLUNG* 7 (4th ed. 1878) (no property is independent of the interests of the community).

of Property.”³⁴ Fisher Ames wrote that “the great duty of all governments . . . is to protect property.”³⁵ The Founders’ conception of protection of “property” is not, however, self-explanatory.

The Federalist No. 10 contains one of the most famous discussions of the political implications of property. There, Madison describes the inevitable division of the citizens of a republic into groups with conflicting interests, or “factions”: “number[s] of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”³⁶ He observed that “the most common and durable source of factions has been the various [sic] and unequal distribution of property. Those who hold and those who are without property have ever formed distinct interests in society.”³⁷

Given the threat that factions present to the functioning of republican government,³⁸ the question arises whether they can be eliminated from political life. Madison concludes that they cannot.³⁹ One reason is the pragmatic impossibility of any other conclusion; to hope that “enlightened statesmen will be able to adjust these clashing interests and render them all subservient to the public good” is to hope in vain.⁴⁰ The second reason is even more fundamental: factions are caused by liberty. It is the liberty to exercise reason that causes differing opinions to be formed. It is the exercise of diverse, individual faculties which is the source of unequal distributions of property, which in turn present an “insuperable obstacle to a uniformity of interests;” since “[t]he protection of these faculties is the first object of government,” the causes of faction cannot be destroyed.⁴¹

All of this could be seen simply as an elaborate justification of existing property arrangements; indeed, the protection of the rights of the property-holding minority clearly concerned Madison.⁴² In *The Federalist* No. 10, the ostensible meaning of property is that which we ordinarily understand: Madison lists creditors, debtors, landed interests, manufacturing interests, mercantile interests, and monied interests as interests which must be regulated by govern-

34. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 302 (M. Farrand ed. 1911). The original state constitutions contained explicit protections for property as well. See G. DIETZE, IN DEFENSE OF PROPERTY 32-33 & n.92 (1963).

35. F. AMES, *Dangerous Power of France. No. III*, in 2 WORKS OF FISHER AMES 309 (S. Ames ed. 1854).

36. THE FEDERALIST No. 10, at 78 (J. Madison) (C. Rossiter ed. 1961).

37. *Id.* at 79.

38. *Id.* at 77-78.

39. *Id.* at 80.

40. *Id.*

41. *Id.* at 78.

42. In a speech about the question of suffrage, Madison wrote that “the danger to the holders of property cannot be disguised, if they be undefended against a majority without property. . . . We must not shut our eyes to the nature of man, nor to the light of experience.” J. Madison, *On the Right of Suffrage*, in THE COMPLETE MADISON 37 (S. Padover ed. 1953).

ment.⁴³ However, it is possible to see something else in this discussion. Madison's emphasis upon liberty both as a cause of faction and as something which entitles property to protection from government suggests that he was concerned with more than protection of rights in material objects.

In 1792, Madison published an essay entitled, simply, *Property*. In this essay Madison discusses property and the role of government in its protection. He begins with a definition of property in material objects: "This term in its particular application means 'that dominion which one man claims and exercises over the external things of the world, in exclusion of every other individual.'"⁴⁴ He then proceeds to describe a conception of property that is far broader:

In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage*.

In the former sense, a man's land, or merchandize [sic], or money is called his property.

In the latter sense, a man has property in his opinions and the free communication of them.

He has a property of peculiar value in his religious opinions and in the profession and practice dictated by them

He has property very dear to him in the safety and liberty of his person.

He has an equal property in the free use of his faculties and free choice of the objects on which to employ them.

In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights.⁴⁵

Madison then continues:

Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. . . .

. . . [T]he praise of affording a just security to property, should be sparingly bestowed on a government which, however scrupulously guarding the possessions of individuals, does not protect them in the enjoyment and communication of their opinions, in which they have an equal, and in the estimation of some, a more valuable property.

. . . Conscience is the most sacred of all property; other property depending in part on positive law, the exercise of that, being a natural and inalienable right. . . .

That is not a just government, nor is property secure under it, where the property which a man has in his personal safety and personal liberty,

43. THE FEDERALIST No. 10, *supra* note 36, at 79.

44. J. MADISON, *Property*, in 6 THE WRITINGS OF JAMES MADISON 101 (G. Hunt ed. 1906). This definition paraphrases one used by Blackstone. See W. BLACKSTONE, *supra* note 1, at *2.

45. J. MADISON, *supra* note 44, at 101 (emphasis in original).

is violated by arbitrary seizures of one class of citizens for the service of the rest. . . .

That is not a just government, nor is property secure under it, where arbitrary restrictions, exemptions, and monopolies deny to part of its citizens that free use of their faculties, and free choice of their occupations, which not only constitute their property in the general sense of the word; but are the means of acquiring property strictly so called. . . .

. . . .

If there be a government then which prides itself on maintaining the inviolability of property; which provides that none shall be taken *directly* even for public use without indemnification to the owner, and yet *directly* violates the property which individuals have in their opinions, their religion, their persons, and their faculties; . . . such a government is not a pattern for the United States.

If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights⁴⁶

Madison's essay is curious and provocative. He clearly saw property as having two distinct meanings. Although it could, in its narrow sense, mean corporeal or incorporeal objects and our relationships to them, it could also mean more. His broader understanding of property as including rights to freedom of conscience, freedom of expression, physical liberty, and the ability to use one's intelligence and creative powers,⁴⁷ is radically different from the ordinary understanding of property today.

Although few other American Founders explored the idea as extensively as Madison, the existence of a broader understanding of property during the Founding Era has been widely recognized.⁴⁸ The House of Representatives of the Colony of Connecticut declared that the people have "property in their own estate," and are "to be taxed by their own consent only . . . and are not to be disseized of their liberties or free customs, sentenced or condemned, but by lawful judgment of their peers."⁴⁹ Joseph Story wrote of property not only

46. *Id.* at 102-03 (emphasis in original).

47. Elsewhere, Madison states that the "faculties of the mind" include "[s]ense, perception, judgment, desire, volition, memory [and] imagination." THE FEDERALIST No. 37, at 227 (J. Madison) (C. Rossiter ed. 1961).

48. See, e.g., P. EIDELBERG, THE PHILOSOPHY OF THE AMERICAN CONSTITUTION 257 (1968) (property, during Founding Era, "encompass[ed] whatever is proper to oneself, including the enjoyment of one's faculties, one's rights and privileges"); F. McDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985) (property was "subtle combination of many rights, powers, and duties, distributed among individuals, society, and the state"); J. REID, THE CONCEPT OF LIBERTY IN THE AGE OF THE AMERICAN REVOLUTION 24-25, 72 (1988); Levy, *Property as a Human Right*, 5 CONST. COMMENTARY 169, 174-77 (1988) (18th century concept of property included constitutional rights and other liberties).

49. Declaration of the House of Representatives of the English Colony of Connecticut (May, 1774), reprinted in 14 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 347-48 (1887).

"in *things*, but of property . . . in *actions*."⁵⁰ Alexander Hamilton suggested that property includes not only material objects but also rights and privileges, particularly those of office.⁵¹ A Revolutionary Era pamphlet described political slavery as "being wholly under the power and control of another as to our actions and properties"⁵²; it meant, in the words of Bernard Bailyn, "the inability to maintain one's just property in material things and abstract rights, rights and things which a proper constitution guaranteed a free people."⁵³

The broad conception of property found in Madison's essay, and implicit in the writings of others in the Founding Era, is not an aberration in intellectual history. Madison's essay reflects an understanding that was common in the writings of the English Whigs, an intellectual tradition to which the Americans were heirs.⁵⁴ The broad conception of property that is associated with Whig ideology⁵⁵ can be found in the pamphlet literature of the seventeenth century. The term "property" or "propriety" was widely used in the seventeenth century to include constitutional liberties as well as other matters.⁵⁶ "[Property] was generally meant to include the natural rights which appertain to man, the protection of which was the chief object of the State's existence."⁵⁷ A pamphlet published in England in 1644 declared that "God . . . hath . . . *made us absolute proprietors of what we enjoy, so that our lives, liberties and estates, doe* [sic]

50. Story, *Natural Law*, quoted in J. McCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 321 (1971) (emphasis in original).

51. P. EIDELBERG, *supra* note 48, at 123. Eidelberg suggests that John Marshall's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), supports this view. P. EIDELBERG, *supra*, at 123 n.18.

52. [Moses Mather], *America's Appeal to the Impartial World* . . . 48 (Hartford, 1775), quoted in B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 233 (1967) (brackets and ellipsis in B. BAILYN).

53. B. BAILYN, *supra* note 52, at 233; see also J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 97-98 (1986) (during Revolutionary Era, no dichotomy existed between personal and property rights; "personal rights were personal property"); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 219 (1969) ("Eighteenth-century [American] Whiggism . . . made no rigid distinction between people and property. Property [was] defined not simply as material possessions but . . . as the attributes of a man's personality that gave him a political character Property was not set in opposition to individual rights but was of a piece with them.").

54. See, e.g., B. BAILYN, *supra* note 52, at 34-54; F. McDONALD, *supra* note 48, at 77-78.

55. See J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT* 507 (1975) (discussing Whig roots of 18th-century civic humanist idea that "personality was founded in property, perfected in citizenship but perpetually threatened by corruption"); Minogue, *The Concept of Property and Its Contemporary Significance*, in *PROPERTY: NOMOS XXII*, *supra* note 23, at 3.

56. See P. LARKIN, *PROPERTY IN THE 18TH CENTURY* 52-53 (1930); Macpherson, *The Meaning of Property*, in *PROPERTY: MAINSTREAM AND CRITICAL POSITIONS* 7 (Macpherson ed. 1978); see also R. OVERTON, *AN ARROW DIRECTED AGAINST ALL TYRANTS AND TYRANNY . . . WHEREIN THE NATURAL AND NATIONAL RIGHTS, FREEDOMES AND PROPERTIES OF MANKIND ARE DISCOVERED* [sic] (1646), cited in P. LARKIN, *supra*, at 45 n.2; W. PRYNNE, *A SUMMARY COLLECTION OF THE PRINCIPAL FUNDAMENTAL RIGHTS, LIBERTIES, PROPRIETIES OF ALL ENGLISH FREEMEN* (1656), discussed in P. LARKIN, *supra*, at 53 n.1.

57. C. CZAJKOWSKI, *THE THEORY OF PRIVATE PROPERTY IN JOHN LOCKE'S POLITICAL PHILOSOPHY* 23 n.62 (1941).

not depend upon, nor are subject to, the sole breath or arbitrary will of our Sovereign [sic]."⁵⁸

The Whig view of property found its most articulate and influential spokesman in John Locke. Locke's views exerted a powerful influence on the American Founders and on the early years of American jurisprudence.⁵⁹ He wrote *Two Treatises of Government*, published in 1690, to challenge the despotic power of kings and to establish the existence of individual rights that could be asserted against arbitrary and oppressive exercises of government power. For Locke, the inherent liberties and rights of individuals were expressed in the concept of property. For him, property was derived from the nature of human personality: "Though the earth, and all inferior Creatures be common to all Men, yet every Man has a *PROPERTY* in his own *person*."⁶⁰ A man's property was intimately connected with his person, with his "being master of himself."⁶¹ Locke's conception of property, rooted in human personality, was broad; it included not only material resources or external objects, but also men's "Lives, Liberties and Estates."⁶² Locke defined property as that which "without a man's own consent . . . cannot be taken from him."⁶³ One commentator has observed that "the Lockean ideal of life, liberty and estate envisages property as 'moral space,' within which an individual has control over his own affairs."⁶⁴

It is apparent that property, under this historical view, was broadly defined. It was tied to the notion of human beings as masters of themselves; it involved the maintenance of personal integrity in both a physical and nonphysical sense. It was intimately related to the development of the human personality, to the exercise of independent thought and creative powers. It was universal and reciprocal: it was that to which we, as human beings, "attach a value and have a right, and which leaves everyone else to the like advantage."⁶⁵

58. *England's Monarch or a Conviction and Refutation by the Common Law of Those False Principles . . . of Albericus . . . etc.*, (London, 1644) (anonymous), quoted in P. LARKIN, *supra* note 56, at 52.

59. See B. BAILYN, *supra* note 52, at 26-30; T. PANGLE, *THE SPIRIT OF MODERN REPUBLICANISM* 22-24, 126 (1988); Whelan, *Property as Artifice: Hume and Blackstone*, in *PROPERTY: NOMOS XXII*, *supra* note 23, at 126.

60. J. LOCKE, *Second Treatise of Government* § 27, in *TWO TREATISES OF GOVERNMENT* (P. Laslett rev. ed. 1988) (3d ed. 1698) (emphasis in original).

61. *Id.* at § 44. See F. McDONALD, *supra* note 48, at 10-11 (discussing Locke's usage of "property" as meaning "particular to, or appropriate to, an individual person").

62. J. LOCKE, *supra* note 60, at §§ 123-124. The writings of Hobbes also gave property a wide meaning. He assigns to the sovereign power "the whole power of prescribing the rules, whereby every man may know, what goods he may enjoy and what actions he may do, without being molested by any of his fellow subjects; and this is it [sic] men call 'propriety'. . . . These Rules of propriety, or *meum* and *tuum*, and of 'good,' 'evill,' 'lawfull,' and 'unlawfull' in the actions of subjects, are the Civil Lawes . . ." T. HOBBS, *LEVIATHAN* Ch. 18 at 113 (Oakeshott ed. 1946). See L. BECKER, *PROPERTY RIGHTS—PHILOSOPHIC FOUNDATIONS* 120 n.11 (1977) ("property" often used by Blackstone, Hobbes and Locke to refer to all of a person's legal rights).

63. J. LOCKE, *supra* note 60, § 193.

64. A. REEVE, *PROPERTY* 142-43 (1986).

65. J. MADISON, *supra* note 44, at 101.

The most apparent difference between this conception of property and most contemporary formulations is its explicit inclusion of a very broad range of individual interests under the rubric of property. The comprehensive approach to property goes far beyond property as physical objects and their analogs to include freedom of expression, freedom of conscience, free use of faculties, and free choice of occupations.⁶⁶ The inclusion of a broad range of individual rights, liberties, powers and immunities in the conception of property changes the nature of property's concreteness. Its concreteness lies not in an actual or symbolic tie to corporeal or incorporeal objects, but in the mediating function that property serves between individual rights and governmental power.⁶⁷

The inclusion of additional rights, however, does not necessarily result in a different understanding of the relationship between the concept of property and the conflict between individual interests and collective power. A broad range of individual rights may be as entitled to absolute protection as a narrow one. Property may still represent, simply, the sphere of legitimate, absolute individual autonomy. Is there any basis for concluding that the comprehensive approach is founded on a different vision? Further, does the inclusion of particular rights—or the manner of their protection—have any implications for this approach?

To the extent that the comprehensive approach is a rights-based theory, the individual interests that it includes are necessarily subject to collective definition and limitation. A right can be defined as that which fulfills an individual need or individual interest that is considered to be of sufficient moral importance to justify the generation of duties for others.⁶⁸ The dependence of a right upon "justification" or upon duties of "moral importance" means that its existence must be rooted in some concept of human well-being:⁶⁹ someone has a right if and only if, other things being equal, an aspect of that person's well-being is a sufficient reason to hold someone else to a duty.⁷⁰ Since a right by its very nature must be recognized not only by the claimant but also by others,⁷¹ the concept of human well-being—and, through it, the identity of protected individual interests—must be collective in nature. Collective notions of

66. Cf. Macpherson, *supra* note 56, at 2 (defining property simply as a bundle of rights, duties, powers, and immunities). Note that even where such sweeping definitions of property are advocated, it is rare to find rights such as freedom of conscience, freedom of expression, or freedom to use individual talents among the property rights contemplated.

67. Cf. J.G.A. Pocock, *supra* note 55, at 463 (function of property, in 18th century, was "to affirm and maintain the reality of personal autonomy, liberty, and virtue").

68. A. Carter, *supra* note 2, at 139 ("Property rights . . . involve the coercion of those who do not respect them. Such coercion requires moral legitimation.") (footnote omitted).

69. Well-being has been defined as what individuals, "endowed with distinctively human capacities of thought, rational choice and action, need if they are to be able to pursue their own individual ends as progressive beings." H.L.A. Hart, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 189 (1983).

70. See J. Waldron, *THE RIGHT TO PRIVATE PROPERTY* 86 (1988).

71. The existence of a right lies "in the conception on the part of everyone who concedes the right to others and to whom it is conceded, of an identity of good for himself and others." T.H. Green, *LECTURES ON THE PRINCIPLES OF POLITICAL OBLIGATION* 216 (1921).

well-being are apparent both in the choice of rights contained within the comprehensive approach to property,⁷² and in the requirement that the included rights be reciprocally and universally granted.⁷³

Encompassed within the comprehensive approach is an involvement of the collective beyond simple definition or limitation of rights. The rights included in this conception of property may be broadly described as being of two kinds: those which protect the autonomy and security of the individual against interference by others—those which, in effect, protect negative liberty—and those which guarantee something more.⁷⁴ Rights of the first kind are a part of any conception of property,⁷⁵ and are the essence of the absolute approach. But rights of the second kind distinguish the comprehensive approach from other modern formulations, and imply a fundamentally different role for the collective in the concept of property.

By distinctly tying the broad range of human rights contained within the concept of property to the development of human personality,⁷⁶ the comprehensive approach not only assumes a collective role in the definition or limitation of individual property rights, but also assumes a collective context for their exercise and realization. If protected individual rights are necessary for the development of personality, there is an implied dependence upon social context for development and fulfillment of these rights.⁷⁷ This can be seen, for in-

72. Madison's statement that property, in its broader meaning, "embraces everything to which a man may attach a value and have a right," J. MADISON, *supra* note 44, at 101, necessarily refers to both individual and collective assessments of what is deemed important for human happiness or well-being.

73. This restraint could be viewed in contractarian terms: only those rights that are agreed to be given to others can be chosen for oneself. "[I]f the law is such that a whole people could not *possibly* agree to it . . . , it is unjust." I. KANT, *On the Relationship of Theory to Practice in Political Right*, in KANT'S POLITICAL WRITINGS 79 (H. Reiss ed. 1970).

74. See I. BERLIN, *Two Concepts of Liberty*, in FOUR ESSAYS ON LIBERTY 118 (1969) (discussing positive and negative liberty).

75. Liberty is an incident of ownership and, therefore, is a part of any conception of property that involves ownership or individual control over corporeal or incorporeal things. See Grey, *supra* note 23, at 69 (identification of property with rights of ownership is essence of "ordinary" understanding of property). Ownership has been described as liberties of use, powers of alienation, and claims to control against interference by others. See J. PENNOCK, *Thoughts on the Right to Private Property*, in PROPERTY: NOMOS XXII, *supra* note 23, at 172; Philbrick, *supra* note 7, at 702.

76. See G.W.F. HEGEL, PHILOSOPHY OF RIGHT § 66, at 52-53 (T. Knox ed. 1942) (Through the exercise of rights to property, a person gains "those goods, or rather substantive characteristics, which constitute [one's] own private personality and the universal essence of [one's] self-consciousness Such characteristics are [one's] personality as such, [one's] universal freedom of will, [one's] ethical life, [one's] religion."); see also Minogue, *supra* note 55, at 11-12 (etymological root of term, *proprius*, means "one's own"); Overstreet, *The Changing Conception of Property*, 25 INT'L J. OF ETHICS 165 (1915) (discussing property as an extension of personality); Radin, *supra* note 13, at 958, 961-78 (discussing extent to which Locke's and Hegel's theories, among others, view object and community relations as central to self-constitution).

77. As such, the rights contained within the comprehensive approach could be seen as expressions of positive liberty. Positive liberty has been variously described as an individual's interest in being one's own master, or the instrument of one's own will; the opportunity to develop personality; and the freedom to establish a place in a community of wills. All theories of positive liberty view social interaction and social context as at least partially constitutive of the personality and well-being of the individual. J. WALDRON, *supra* note 70, at 298-302, 313.

stance, in Madison's statement that the security of property requires governmental elimination of "restrictions, exemptions, and monopolies" that impair individuals' free use of their faculties and free choice of their occupations.⁷⁸ By envisioning a collective context for the exercise of the individual rights contained within the concept of property, the comprehensive approach gives the collective an integral role within the concept of property itself. Property is not simply that which describes and protects individual autonomy; rather, it is a complex concept that includes a broad range of human liberties understood within a collective context of both support and restraint.

Admittedly, during the Founding Era, "property" retained its narrow as well as its broad meaning;⁷⁹ it is therefore difficult to tell, in the absence of explicit usage, which meaning was intended in any particular context. The fact that the term had multiple meanings leads to a difficult question. If both conceptions existed during the Founding Era, why (in contemporary interpretations of that Era) is the comprehensive approach often overlooked? Why is it generally assumed that the absolute conception was the exclusive understanding during that period?

The answer to this question is, I believe, found in the nature of the two conceptions and in the rise of individualistic theories. The comprehensive approach incorporates the historical tension between the individual and the collective; although there were strong elements of collectivism and individualism in the historical conception, it required no particular resolution of the tension between these elements in the form of a particular property system or particular property rights.⁸⁰ The absolute conception, however, advances a clear case for the supremacy of individual interests by defining property to be that which describes and protects the individual's autonomous sphere.⁸¹

78. J. MADISON, *supra* note 44, at 102-03.

79. See *supra* text accompanying notes 36-53; see also J. LOCKE, *supra* note 60, at §§ 31, 135, 138 (using property in its narrow sense); F. McDONALD, *supra* note 48, at 4, 10 (noting multiple understandings for "property" during Founding Era).

80. Recognition of a collective role within the concept of property did not, for instance, result in an assumed need to redistribute physical property between rich and poor or to otherwise radically reorient social or political values. See Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J. L. & ECON. 467, 468-69 (1976) (Locke made private property antecedent to government in order to allow for limited revolution: alteration in government, without alteration in existing property allocations).

An inherent tension existed between the 18th-century view that property is crucial to the development of personality, or that property secures liberty, and the simultaneous view that no redistribution of wealth was required. If property (including material property) is necessary for the development of personality or the maintenance of personal and political independence, it is difficult to see how its deprivation can be justified. Eighteenth-century theorists attempted to circumvent this difficulty by stressing that it is the security of property, not property itself, that ensures liberty. J. REID, *supra* note 48, at 5, 70-73. This does not, however, address the essential problem. If "[m]aterial possessions . . . bolstered liberty by making individuals independent of government", *id.* at 5, the conclusion is inescapable that some enjoyed greater "liberty" or "property" than others.

81. The Supreme Court's takings and due process clause jurisprudence illustrates that this is a logical fallacy: defining property as that which describes and protects the individual's legitimate sphere does not, of itself, determine which individual interests are "legitimate" and which are not.

During the Founding Era, older notions of property systems based upon ideas of trust and individual duties as well as rights⁸² competed with newer theories which advocated commercial growth and wealth maximization through the protection of individual initiative and interests.⁸³ Many of these newer theories held individual rights to be of extraordinary importance—indeed, such rights were viewed as shields against royal authority and other arbitrary power.⁸⁴ The growing importance of the protection of individual rights, and an implicit equation of the absolute conception with that protection, led to a strong identification of property with the absolute conception.⁸⁵

Thus, while absolute protection of individual interests in the possession, use, and disposition of material objects was often the outcome of these tensions between competing individual and collective interests, protection of particular interests was not synonymous with the concept of property itself. The comprehensive approach stresses that property, in the historical understanding, served a mediating function between individual rights and governmental power. It neither contained nor encouraged absolute individual protection over collective goals.

IV. IMPLICATIONS

Reclaiming the comprehensive approach has profound implications for our understanding and treatment of the concept of property. For example, use of the comprehensive approach would force courts to face explicitly the real policy issues involved in cases under the takings and due process clauses. The Supreme Court's current jurisprudence under these clauses has been driven by an absolute approach, whereby property is something that is objectively identifiable, that represents and protects the individual's autonomous sphere. The Court's vision of property—whether defined in terms of "ordinary understandings,"⁸⁶ "reasonable expectations,"⁸⁷ or another approach⁸⁸—does not vary

82. Before the 17th and 18th centuries, the possession of land was associated with governance: the possession of property gave entitlement to rule, with its privileges and responsibilities. See Philbrick, *supra* note 7, at 707-10 (discussing feudal origins of idea that all property is held subject to performance of duties, including public ones); Rose, *Public Property, Old and New*, 79 NW. U.L. REV. 216, 219-21 (1984); Rose, *supra* note 14 (manuscript at 17-21, 25-26); see also F. McDONALD, *supra* note 48, at 10-13 (property historically viewed as combination of many rights, powers, and duties, distributed among individuals, society, and the state).

83. See, e.g., J. MADISON, *supra* note 42, at 37 (Property is an essential object of the law, "which encourage[s] industry by securing the enjoyment of its fruits."); see also Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 87-88 (1990) (discussing decline of Old Regime and rise of belief in role of private property systems in increasing total national wealth and power).

84. See, e.g., THE FEDERALIST NO. 10, *supra* note 36; P. LARKIN, *supra* note 56, at 12, 20, 145-64 (discussing prevalence of this view among American Founders); J. LOCKE, *supra* note 60, at §§ 91, 94, 95, 138.

85. Cf. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 42-46 (1986) (belief that government had legitimate power and indeed duty to tax citizens for relief of poor coexisted with understanding that purpose of government was to protect individual property rights).

86. See *supra* note 9.

according to collective pressures or goals, since it is precisely the resistance to the demands of the collective that this approach to property provides. When the absolute approach is combined with seemingly absolute constitutional guarantees, the inevitable accommodation of social goals results in intellectual incoherence and seeming arbitrariness.

The Supreme Court's ostensible use of an absolute approach to property results in a kind of patent dishonesty: property is portrayed as a matter of technical understanding or definition, while the conception is artificially manipulated to reach a result that is compatible with social goals. As a result, the inevitable balances between individual and collective interests are struck silently without explanation.⁸⁹ Explicit acknowledgement of the mediating function of property, and the involvement of the collective in determining the nature and scope of individual rights, makes explicit the real policy issues.

The framework developed by Calabresi and Melamed in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*⁹⁰ reveals the problems inherent in the use of an absolute approach to property and suggests how the comprehensive approach can resolve these problems. Under their analysis, entitlements created by property and tort law are of three types: those protected by property rules, those protected by liability rules, and those which are inalienable.⁹¹ Entitlements protected by property rules can be taken only if the holder agrees to the price offered, giving him veto power over the transaction.⁹² Entitlements protected by liability rules may be taken if the other party pays a value established by the state; they may therefore be taken without the holder's consent.⁹³ No transfer of inalienable entitlements is permitted.⁹⁴

The language of "entitlement" suggests that an absolute conception of property—property as something objectively defined which describes and protects the individual's autonomous sphere—underlies the rules that the model describes. An entitlement, as implied by the word itself, is not partial or contin-

87. See *supra* note 10.

88. Other approaches include the "functional" approach, the "bundle of rights" approach, the "personhood" approach, and the protection of reliance interests. See *supra* notes 11-13.

89. The *Penn Central* case seems to be an exception. There the Court's majority engaged, at least in part, in explicit balancing of individual and collective interests. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-28 (1978). However, the Court's ostensible use of an absolute conception of property made the balancing theoretically incongruous: if property is objectively identifiable and absolute, it is impossible to understand how there is room for the "balancing" of collective interests. Justice Brennan attempts to reconcile this difficulty by suggesting that even if particular property rights are destroyed by governmental action, the strength of collective interests may mean that a constitutionally cognizable "taking" has not occurred. *Id.* at 130-35. This ignores the fact that whether a particular governmental action is a "taking" depends upon the nature of the underlying right. See *supra* note 14. If property rights are (as the Court generally envisions) objectively identifiable and absolute, it is impossible to see how any impairment is not a taking.

90. 85 HARV. L. REV. 1089 (1972).

91. *Id.* at 1092.

92. *Id.*

93. *Id.*

94. *Id.* at 1092-93.

gent; it is one's absolute property. For entitlements protected by property rules, this is true. For entitlements protected by liability rules, however, and those deemed inalienable, it is not. In those instances, we have things which the language of "entitlement" calls property, but which can in fact be subject to deprivation (protection by liability rules) or their disposition subject to complete control (declarations of inalienability) by others.⁹⁵

The conflict between entitlements and their less-than-absolute protection mirrors the deep ambiguity that haunts decisionmaking under the takings clause. The takings clause is, at its core, the reduction of "property" protection to "liability" protection: private property may be taken as long as there is a public purpose and compensation is paid. Adherence to the absolute image of property, as that which describes and protects the individual's autonomous sphere makes this a seeming injustice.

The problem inherent in the protection of a "property" right by a liability rule is further reflected in the remedy that is usually afforded for an unconstitutional taking: the court strikes down the offending legislation, rather than remanding the case for assessment of compensation.⁹⁶ Although this remedy might be the result of difficulties in valuation in some cases, an equally plausible explanation is that the courts are simply reluctant (despite the explicit language of the takings clause) to relegate private property to liability protection.⁹⁷ The effect of the underlying, absolute conception of property can also be seen in the measure of damages claimed or awarded under a liability rule. If compensation is at issue, the amount claimed (or awarded) is the entire value of the property at stake. This is true even when the existence of the property interest rests upon arguably divisible parts, such as "reasonable" and "unreasonable" expectations.⁹⁸

The comprehensive approach works a fundamental change in these relationships. If the conception of property describes the tension between the individual

95. See Coleman & Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986) (discussing theoretical inconsistency implicit in liability rule protection for rights which imply autonomy or control of right-holder).

96. See, e.g., Mandelker, *Land Use Takings: The Compensation Issue*, 8 HASTINGS CONST. L.Q. 491, 491-92 & n.2 (1981). An exception may appear in cases where there is a temporary taking. See, e.g., *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). In such cases, compensation is awarded because the fundamental problem no longer exists: the claimant has regained the property in issue, making the question of property protection irrelevant.

97. See Calabresi & Melamed, *supra* note 90, at 1124-27 (discussing, in context of criminal sanctions, society's need to prevent property rules from being changed at will into liability rules). Calabresi and Melamed identify a number of reasons why legal writers have largely ignored the possibility of protection of entitlements by liability rules in nuisance-pollution cases. *Id.* at 1116-17. I would advance another: if property is that which describes and protects the individual's absolute sphere, the coupling of this notion with the fact that these rights can be enjoyed only upon payment of compensation to someone else (or, if viewed in the mirror image, that the rights of the other party can be taken away upon the payment of compensation) is deeply troubling. It is this reluctance—this instinctive avoidance of the protection of seemingly absolute property interests with liability rules—that haunts the Court's treatment of takings cases.

98. The failure to consider partial compensation is particularly striking in cases where a preexisting use is later claimed to be a public nuisance. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

and the collective, rather than a particular outcome of that tension, the problems inherent in the reconciliation of an absolute approach with less than absolute protection do not exist. In the language of Calabresi and Melamed, if "entitlements" or their analogues are seen in contingent (rather than absolute) terms, the protection of those entitlements by liability rules will not compromise the underlying conception of property. The protection of property rights by liability rules (as is required by the takings clause) loses its aura of illegitimacy, resulting in greater flexibility in the application of liability rules and in the computation of damages awarded under them.⁹⁹

Adoption of the comprehensive approach would also eliminate the inherent problem in the reconciliation of absolute protection of property with the need for different treatment of individual and collective interests in the context of the takings and due process clauses.¹⁰⁰ Differing definitions of property in the context of the two clauses cannot be reconciled as long as the underlying assumption is that property is objectively definable or identifiable, apart from social context. A conception of property that includes explicit acknowledgement of collective concerns does not present this difficulty.

One might object that, although the comprehensive approach to property may have been workable at one time, it is an anachronism today when individual and collective interests are at fundamental odds. Many scholars have written about the prevalent eighteenth-century belief in the identity of individual and social interests.¹⁰¹ If individual and social interests coincide, there is certainly less need for, and less danger posed by, an interventionist state. In modern pluralistic society, this alignment of individual and social interests, if it ever existed, exists no more.

Belief in the alignment of individual and social interests would reduce the envisioned tension between the individual and the collective contained within the concept of property. However, the fact that this tension (or its recognition) may have increased does not mean that it should be hidden through the use of a conception of property which purportedly describes inviolable individual rights but which does not provide absolute protection. The fact that increased

99. Cf. Coleman and Kraus, *supra* note 95, at 1345-46 (Rights are merely conceptual markers or placeholders used to designate subset of legitimate interests or liberties to be accorded special protection by law; specific content or meaning for such rights is "a *normative, not an analytic*, one supportable, if at all, by substantive agreement, not linguistic convention.") (footnote omitted) (emphasis in original). Put in the terms of the subject of this essay, the definition of property as that which defines and protects the individual's sphere of autonomy or control (the "absolute" approach) is replaced by a conception where questions of control are seen as normative, chosen by agreement, and internal to the concept itself. Coleman and Kraus frame the issue as rethinking the nature of rights; I would frame the issue as whether the tension between the individual and the collective is external to the concept of property, or internal to it.

100. See *supra* notes 21-23 and accompanying text.

101. Prior to the end of the 18th century, it was traditionally believed that the interests of the individual were essentially identical to those of society. See G. WOOD, *supra* note 53, at 219. By the end of the 18th century, however, "Americans were emphasizing more and more the 'different and discordant interests' existing in all societies." *Id.*

tension between the individual and the collective may exist in contemporary society demands that the balances involved be struck after more scrutiny, not less. We cannot escape the difficult questions that these conflicts present. The law of property already addresses them—by default, if not otherwise. The only question is whether they should be decided with or without explicit examination.

Recognition that any conception of property inevitably involves the balancing of individual and collective interests leads to a final question: would the adoption of the comprehensive approach mean any more than the universally recognized idea that individual rights, protected under the rubric of property, must exist in a collective context? Put another way, is there any difference between viewing property as a collage of individual rights balanced against external, collective interests, and viewing the competing interests of the individual and the collective as part of the conception of property?

The answer, I believe, lies at least in part in the power of the concept of property. Despite assertions to the contrary,¹⁰² property retains its symbolic meaning and rhetorical power.¹⁰³ Contemporary approaches to property—even those that define the concept in broad human or economic terms—proceed from a vision of property as that which protects, and separates, the individual from the collective sphere.¹⁰⁴ In recent years, the assumption that protection of the individual is the final, irreducible political principle has been attacked.¹⁰⁵ Some have attacked the foundational idea of individual rights;¹⁰⁶ others have attempted to develop a model which retains the value of individual freedom in

102. See, e.g., Grey, *supra* note 23, at 69-74 (arguing that modern conceptions of property weaken its symbolic nature and threaten its disintegration); Nedelsky, *supra* note 28, at 251 ("If property is not a 'thing,' . . . not a sacred right, but a bundle of legal entitlements subject . . . to rational manipulation and distribution . . . , then it can serve neither a real nor a symbolic function as boundary between individual rights and governmental authority.").

103. The fact that the mythology of property (as that which represents the individual's protected sphere) has survived even though the content of the myth (definitions of protected rights) has undergone continual change presents, in Nedelsky's view, a paradox. Nedelsky, *supra* note 28, at 241. Indeed, it is the desire to capitalize upon this symbolic meaning and rhetorical power that has motivated attempts to broaden the range of individual rights included within the concept of property. *Id.* at 255. The continued power of the myth of property is suggested by a recent study which concludes that "property is increasingly . . . viewed by litigants as a bastion against an ever encroaching state." Donahue, *The Future of the Concept of Property Predicted from Its Past*, in PROPERTY: NOMOS XXII, *supra* note 23, at 53.

104. Radin links the protection of individual interests to the extent to which they further "human flourishing"—a "positive view of freedom, in which the self-development of the individual is linked to proper social development." Radin, *Liberal Conception of Property*, *supra* note 21, at 1688. Although this approach could lead to the reconceptualization of the tension between the individual and the collective as something within the concept of property, her focus is upon the extent to which "personhood" factors should affect the recognition of traditionally defined (individual) property rights. See *id.* at 1695.

105. See, e.g., A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); M. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982).

106. See, e.g., E. PASHUKANIS, *The General Theory of Law and Marxism*, in PASHUKANIS: SELECTED WRITINGS ON MARXISM AND LAW (P. Beirne & R. Sharlet eds. 1980) (repudiating idea of individual rights); cf. T.H. GREEN, *supra* note 71, at 207 (redefining individual rights in terms of communal welfare).

the context of collective life.¹⁰⁷ All of these efforts reflect dissatisfaction with a political tradition which has viewed the self as inviolable and absolute. It is this vision of self that we have attributed to Locke and the Founders. As a result of this vision, we are limited to a series of confrontations between competing selves and competing collectivities.

Property has been seen as the concrete expression of this view of self and the dichotomy between self and others. The powerful, rhetorical image of property, as that which gives the individual a bulwark of isolated independence from her fellows, has been cited as the central symbol of the antagonism between the individual and collective life.¹⁰⁸ Rethinking the concept of property, therefore, has particular symbolic and actual potential as a way to rethink this vision. The comprehensive approach recognizes the individual's need to develop the capacities of self in the context of relatedness to others; it stresses that individual autonomy and social context are in fact deeply intertwined. By viewing a collective context as necessary for the definition and exercise of individual rights, the comprehensive approach to property forces us to rethink the relationship between the community and individual rights. It is a step toward rapprochement of ideas of individual liberty, individual autonomy, and collective life.

V. CONCLUSION

Historical theories can provide "a rich fund of insight, reminder, and argument for modern political theory and debate."¹⁰⁹ The continuing, mythological importance of the concept of property, as a matter of intellectual inheritance, political theory, common understanding, and our constitutional order, makes reclaiming the historical understanding of property of particular importance. Contemporary attempts to adhere to an absolute approach to property—to define property as that which represents and protects the individual's autonomous sphere—have yielded a choice between an intellectually incoherent and disintegrated concept on the one hand and the exaltation of individual interests over collective interests on the other. By explicitly recognizing the tension between the individual and the collective as a part of the concept of property, the

107. This effort has been most striking in feminist legal theory. See, e.g., S. BENHABIB, CRITIQUE, NORM, AND UTOPIA 348 (1986) ("[O]ur selfhood give[s] us each a perspective on the world, which can only be revealed in a community of interaction with others."); Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, *supra* note 29, at 7, 9-12 (redefining individual autonomy as combined expression of "the claim of the constitutiveness of social relations with the value of self-determination"); Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904-06 (1987) (personhood involves both dissociation from and interaction with physical and social context). The retention of individual freedom in the context of formative collective forces also has been attempted in neo-republican political theory, see, e.g., Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548-51 (1988), and in critical legal theory, see, e.g., R. UNGER, KNOWLEDGE & POLITICS (1975).

108. Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, *supra* note 29, at 11, 17.

109. J. WALDRON, *supra* note 70, at 136.

comprehensive approach provides an alternative to this dilemma. It reaffirms the importance of the concept of property, while recognizing the interdependence of the self and others.